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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (A California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I. PRELIMINARY STATEMENT

This brief is filed on behalf of several of the States of the United States, by their chief law officers, because of the serious implications of the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case (*Brand-*

howe v. *Tenney*, 183 F. 2d 121) when considered in conjunction with the decision of the Circuit Court of Appeals for the Second Circuit in *Picking* v. *Pennsylvania R. Co.* (1945), 151 F. 2d 240; (certiorari denied 332 U.S. 776; rehearing denied 332 U.S. 82[illegible]). These decisions, in the opinion of *amici curiae*, pose a formidable threat to the sovereignty of the States and the functioning of their governmental agencies. They are based upon a construction of the Federal Civil Rights Act which goes far beyond any intent expressed by the framers of that legislation and which so far invades the reserved powers of the States that (assuming the existence of the power to do so) it is highly unlikely that Congress ever intended that these acts should be so applied. It is not too late for this Court to examine fully the whole problem; and it is the purpose of this brief to clarify the issues so that the matters which are basic to the States will be carefully examined by the Court.

Amici curiae are not interested in the local concerns which gave rise to the litigation in the present case. Neither are they prepared to express an opinion as to the desirability of State legislative committees created to study the subject of un-American activities, or as to the rules of procedure which such committees should follow in carrying out the responsibilities assigned to them in that field. They are concerned, however, about the promulgation of a rule of law which would impose a personal liability in damages upon members of a State Legislature (or other State officers, for that matter) which is based upon a standard of liability dependent upon the broad generalities of the 14th Amendment to the United States Constitution, as that Amendment is construed by the courts from time to time.

II. SCOPE OF THIS BRIEF

The Circuit Court of Appeals in this case reversed the trial judge's dismissal of the action as to defendants herein upon the ground that a cause of action is stated under Section 43, Title 8, U.S.C.A., (17 Stats., 13; R. S. sec. 1979) which reads:

> "Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

We assume for the purpose of this brief that this eliminates, before this Court, any need for discussing Section 47(3) of said Title (R. S. Sec. 1980; 12 Stat. 284; 17 Stat. 13), and we will confine our discussion to the above statute and to the principle which the Circuit Court of Appeals laid down as the law of the case, i.e. "that [issue] pertaining to the consequences of an unwarranted interference, if any there was, with the right of freedom of speech."[1]

This limitation on the scope of our brief is not meant to indicate that we are unconcerned with the other issues presented by the case. In this regard, we are prepared to support the position taken by defendants in their brief. We

[1] 183 F. 2d 121. Sec. 47(3) of Title 8, U.S.C., relates specifically, and exclusively to causes of action based upon discrimination and denial of equal protection of the laws (*McShane* v. *Moldovan*, (CCA 1949) 172 F. 2d 101; *Bottone* v. *Lindsley*, (CCA 1948) 170 F. 2d 705, cert. den. 336 U.S. 949, 69 S. Ct. 810, 93 L. Ed. 1101). In this connection *amici curiae* support the position taken in defendants' brief before this Court, that is, that nowhere in the allegations of the complaint can be found the charge of purposeful discrimination between the plaintiff and others similarly situated which could give rise to a cause of action based upon a denial of equal protection of the laws.

agree with them that the Federal Civil Rights Acts were never intended to be used as a vehicle for inquiring into the motives of state legislators, or for breaking down the traditional doctrine of legislative immunity from private damage actions.

As is forcefully pointed out by defendants in their brief before this Court, we think that the right to petition a State Legislature is not a right guaranteed by the United States Constitution. Like defendants we find no allegations in this complaint which would bring into play the privileges and immunities clause of the 14th Amendment (see *Slaughterhouse Cases* (1873), 16 Wall. 36, 21 L. Ed. 394; *Adamson* v. *California* (1946), 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903) or the equal protection clause of that Amendment. (See, *Snowden* v. *Hughes* (1943), 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497) Furthermore, as will appear more fully hereafter, the basic premise relied upon in this brief is that the due process clause of the 14th Amendment furnishes too uncertain a standard (in the absence of judicious limitation) to constitute a basis for civil liability in damages against State officers. The same premise applies to the privileges and immunities clause and the equal protection clause as was pointed out by Justice Douglas in the case which we believe furnishes a pattern upon which the instant case must be decided:

> "Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause [citing cases] and the equal protection clause [citing cases] of the Fourteenth Amendment are involved." (*Screws v. United States* (1945), 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330.)

We propose, therefore, to devote our effort in this brief to a consideration of the "due process" clause of the 14th Amendment, and the extent to which a civil cause of action in damages against a state legislator is created under that clause by use of the phrase "rights . . . secured by the Constitution and laws" in Section 43 of Title 8, U.S.C.

The precise question we desire to place before this Court, and the crucial issue presented by the instant case is this:

> IN A CASE SUCH AS THE ONE ALLEGED, WHERE THE "TREACHEROUS GROUND"[2] OF THE DUE PROCESS CLAUSE IS INVOLVED, CAN A CAUSE OF ACTION FOR CIVIL DAMAGES BE STATED AGAINST STATE LEGISLATORS UNDER THE FEDERAL CIVIL RIGHTS ACT (Sec. 43 of Title 8, U.S.C.) UPON ALLEGATIONS THAT, IN THEIR CONDUCT OF AN OFFICIAL LEGISLATIVE PROCEEDING NOT OTHERWISE UNLAWFUL, THEY HAVE IMPROPERLY INTERFERED WITH FIRST AMENDMENT GUARANTEES OF FREE SPEECH, MADE APPLICABLE TO THEIR STATES AND TO THEMSELVES BY THE (SUBSTANTIVE) DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT.

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[2] Douglas, J. writing the majority opinion in the *Screws* case, 325 U.S. 97: "The treacherous grounds on which state officials—police, prosecutors, legislators, and judges—would walk is indicated by the character and closeness of decisions of this Court interpreting the due process clause of the Fourteenth Amendment. [Giving examples] . . . these are illustrative of the kind of state action which might or might not be caught in the broad reaches of Sec. 20 [the Federal Civil Rights Act] dependent on the prevailing view of the Court as constituted when the case arose."

III. NATURE OF THE CIVIL CAUSE OF ACTION UNDER SECTION 43.

A. Relationship between the civil and criminal causes of action under the Federal Civil Rights Act.

The background underlying this legislation has been fully explored in recent decisions of this Court.[3] Thus, it has been pointed out that the legislation was based upon Section 5 of the 14th Amendment, giving Congress the right to implement the guarantees of that provision, and that the civil and criminal provisions are traceable to the same basic legislation. (See *Screws* case, *supra*, and particularly the legislative history traced in 325 U.S. 98.) The courts have consistently construed the civil and criminal portions of the statute to be *in pari materia*. (See *McShane* v. *Moldovan*, (CCA 1949), 172 F. 2d 1016) Both the civil and criminal causes of action were used in limited numbers of cases prior to 1940, and for the most part such cases were involved with specific statutory or constitutional prohibitions involving federal elections and discrimination against individuals upon grounds of race or color.[4] These, of course, were the great issues out of which grew the formulation of the 13th, 14th and 15th Amendments, and the Civil Rights Acts. Not until 1945, however, were the criminal provisions of the statute applied by this court to the "vast, undisclosed range of the Fourteenth Amendment."[5] The Court saved the constitutionality of the

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3 *Screws* v. *United States* (1945), 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495; *United States* v. *Classic* (1940), 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368.

4 See the list of cases compiled in "Liability of Public Officers to Suit under the Civil Rights Acts," (1946) 46 Columbia Law Review 614; and cases collected in annotation (1946) 162 A.L.R. 1373-1401.

5 "The Government recognizes that 'this is the first case brought before this Court in which Section 20 has been applied to deprivations of rights secured by the Fourteenth Amendment.'" *Screws* v. *U.S.*, *supra*, 325 U.S. 157.

criminal statute in the *Screws* case by recognizing that a *limited criminal cause of action* could be said to exist under the statute, thus preserving the criminal sanction for any violations of the due process clause which had become sufficiently specific, either by legislation or by prior decisions of the Court. The question of when a due process prohibition can be said to have become sufficiently specific to meet the test of constitutionality cannot be decided by any pre-determined test. Certainly in that case, where law enforcement officers brutally beat a colored prisoner to death, it was not hard to reach the conclusion that a clear and intentional deprivation of known due process rights was involved. The conceded uncertainties inhering in the Fourteenth Amendment and the requirement for "pricking out" the line in a case-by-case series was clearly recognized by both the majority and the minority of the Court. Even in that aggravated situation, three members of the Court did not find the requisite certainty. The majority, however, sustained the statute as a criminal prohibition *by ruling out the areas of uncertainty*, and by limiting the criminal cause of action *to the areas of certainty*.

For the first time, this Court is now faced with applying the broad reaches of the Fourteenth Amendment to a civil liability in damages created against State officers by the Federal Civil Rights Act. It is our position that this issue, presented herein for the first time, must be solved along the lines which were carved out when the criminal cause of action on the due process clause was first before this Court in 1945.

The civil cause of action, based on Section 43 of Title 8, U.S.C., with the exception of the word "wilful," contains *the same* language which the Court was considering in the *Screws* case (*supra*). The phrase which was the subject of the attack was "any rights, privileges or immunities secured [or protected] by the Constitution and laws." Except for the phrase enclosed in brackets the language of Section 43 is identical. The decision of the Court declares that if this language embraces "those broad and fluid definitions of due process" it contains *no* standard by which any person can guide his conduct. As expressed by the Court:

> "To enforce such a statute would be like sanctioning the practice of Caligula who published the law, but it was written in a very small hand and posted up in a corner, so that no one could make a copy of it." (325 U.S. 96)

The Court, after citing cases to illustrate its remark, went on to state, in effect, that if the statute were so interpreted:

> "Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea." (325 U.S. 97)

These words, which are equally applicable to the statute here involved, understate the danger to state officials by confining themselves to law enforcement officials. The *Picking* case (*supra*) and this case indicate that the legislative and judicial branches of State governments are faced with the same impossible choice unless this Court clarifies the situation.

B. Prior Judicial Application of the Screws Case to the Civil Cause of Action; the Picking Case.

The issue now raised before this Court was considered in *Picking* v. *Penna. R. Co., supra,* (cert. den. 332 U.S. 776. No. 6.)[6] After considering the action of this Court in the *Screws* case, the Circuit Court of Appeals indicated that the civil cause of action under Section 43 does not have to be limited in its scope as the criminal cause of action was limited. The Circuit Court observed (151 F. 2d at 249):

"The Screws decision held Section 20 of the Criminal Code constitutional because it contained the word willfully and indicated that if that word had not been inserted by the revisers the statute would not meet the test of the Fifth Amendment, citing *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045. But R. S. Sec. 1979 [Section 43 of Title 8, U.S.C.] *which creates a civil liability* for a tortious act cannot be held to be too vague to meet the test of the Fifth Amendment because it does not refer to the state of mind of the tort-feasor." (Italics added).[7]

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6 Denial of certiorari, we assume, does not indicate any approval by this Court of the views expressed by the Circuit Court of Appeals. (See *Maryland* v. *Baltimore Radio Show* (1949), 338 U.S. 912, 70 S. Ct. 340, 94 L. Ed. 252.

7 In support of this proposition the case of *Hague* v. *C.I.O.* (1938), 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 is cited. Neither the constitutionality nor the permissible scope of the statute was before this Court in that case. The Court carefully stated (307 U.S. 506, 507):

> "By their specifications of error the petitioners limit the issues in this court to three matters. They contend that the court below erred in holding that the District Court had jurisdiction over all or some of the causes of action stated in the bill. Secondly, they assert that the Court erred in holding that the street meeting ordinance is unconstitutional on its face, and that it has been unconstitutionally administered. Thirdly, they claim that the decree must be set aside because it [i.e., *the decree*] exceeds the court's power and is impractical of enforcement or compliance."
> (Matter in brackets added).

In addition, the case involved an injunction. Federal courts have frequently enjoined state action, and it is doubtful whether any precedent is created thereby which would apply to a cause of action for damages against state officers. See (1946) 46 Columbia Law Review 614, 619.

This language fails to give full effect to the principal opinion in the *Screws* case (*supra*). As we have pointed out, that opinion flatly stated that, without the restrictions imposed by the Court, those subject to the prohibitions of the due process clause under the statute could neither know nor find out (until after they had acted) whether their action made them liable to criminal penalties. The opinions of the Court recognize that such a statute would deprive those affected of due process of law.

The burden of complying with unknowable standards of conduct is not less unjust if it imposes an obligation to pay $250,000 damages than it is if it results in a conviction and fine of $1,000. To distinguish between the statutes on the theory that one imposes criminal sanctions while the other imposes civil sanctions is to beg the constitutional question involved. In *Small (A. B.) Company* v. *American Sugar Ref. Co.* (1924), 267 U.S. 233, 45 S. Ct. 295, 69 L. Ed. 589, this court made the following statement concerning *United States* v. *L. Cohen Grocery Co.* (1920), 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045, mentioned in the language of the *Picking* case last quoted above:

> "In a series of cases of which *United States* v. *L. Cohen Grocery Co.* 255 U.S. 81, 65 L. Ed. 516, 14 A.L.R. 1045, 41 Sup. Ct. Rep. 298, and *Weeds* v. *United States*, 255 U.S. 109, 65 L. Ed. 537, 41 Sup. Ct. Rep. 306, are examples, this court held that provision invalid as contravening the due process of law clause of the 5th Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was . . .

"The defendant attempts to distinguish those cases [i.e., the Cohen Grocery case and the Weeds case] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. *It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as to really be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases.*" (Emphasis added.)

And in *Cline v. Frink Dairy Co.* (1926), 274 U.S. 445, 47 S. Ct. 681, 71 Law Ed. 1146, the Court declared that:

"The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well as in civil as in criminal legislation . . ."

The language used by seven members of the Court in the *Screws* case (*supra*) establishes the following principle beyond any room for doubt: That is, unless the statute here involved is restricted as was the criminal cause of action based upon its counterpart, this statute would require obedience to a rule or standard so vague as to be no standard at all, i.e., "an unknowable something."[8] This would violate the due process clause of the Fifth Amendment under the cases cited above, and the courts would have no

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[8] Language used Douglas, J., in *Screws* case, *supra*, 325 U.S. p. 105. Cf., Roberts, J., at 325 U.S. p. 157:

"There is no difficulty in passing effective legislation for the protection of civil rights against improper state action. What we are concerned with here is something basic in a democratic society, namely, the avoidance of the injustice of prohibiting conduct in terms so vague as to make the understanding of what is proscribed a guess-work too difficult for confident judgment even for the judges of the highest Court in the land."

hesitation in striking down any such statute passed by Congress. This Court cannot do less when dealing with prohibitions of individual conduct based upon its construction of the due process clause of the Fourteenth Amendment.

IV. APPLICATION OF THE CIVIL CAUSE OF ACTION UNDER SECTION 43, PROPERLY CONSTRUED, TO THIS CASE.

A. Basis of Limitation Laid Down in Screws Case.

We have previously demonstrated the conviction of seven members of the court in the *Screws* case (*supra*) that the statute there involved would be void if it made criminal all conduct which might violate the due process clause of the Fourteenth Amendment. Without specifically defining such conduct, it would exact obedience to a rule or standard so vague as to be no standard at all and it would, for that reason, violate the due process clause of the Fifth Amendment.

Recognizing its duty to construe the statute in such a manner as to uphold its constitutionality, the court imposed *limitations on the cause of action* (as distinguished from its concept of the broad coverage of the Fourteenth Amendment)—limitations which would enable all persons affected by the statute to know what conduct must be avoided. *Nothing less would save the statute.* The court did this by requiring an unusually specific intention to deprive someone of a clearly-recognized constitutional right.[9] The court said (325 U.S. 103:

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[9] The court, in limiting the criminal cause of action, relied heavily on the presence of the word "wilfully" in the statute. It is clear, however, that to avoid unconstitutionality for vagueness the same limitations on the cause of action would have been required in the absence of that word. This was recognized by the judges who sustained the statute as an adequate definition of a criminal cause of action. See, Douglas, J., in the *Screws* case, 325 U.S. p. 103; Rutledge, J., 325 U.S. p. 120.

"We repeat that the presence of a bad purpose or evil intent may not be sufficient. We do say that a requirement of a specific intent to deprive a person *of a federal right made definite by decision or other rule of law* saves the Act from any charge of unconstitutionaliy on the grounds of vagueness."

And Again the court declared (325 U.S. p. 105):

"For the specific intent required by the Act is an intent to deprive a person of a right *which has been made specific* either by the *express terms* of the Constitution or laws of the United States *or by decisions interpreting them.* Take the case of a local officer who persists in enforcing a type of ordinance *which the Court has held invalid* as violative of the guarantees of free speech or freedom of worship. Or a local officer continues to select juries *in a manner which flies in the teeth of decisions of the Court.* If those acts are done wilfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute. He violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law. *He who defies a decision interpreting the Constitution knows precisely what he is doing.*" [10]

Whether the officer in the illustration was defying announced rules of law, or flying in the teeth of decisions of the court would therefore depend upon how closely the ordinance which he was enforcing resembled an ordinance which had previously been denounced by the court. A decision striking down as an impairment of the right to free

[10] It is, of course, obvious that there are many ordinances aimed to meet many different supposed evils in many different ways. Some may infringe upon the right of free speech. The Fourteenth Amendment does not prohibit the states in all cases and under all circumstances from impairing this right (*American Communication Assn.* v. *Douds* (1949), 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925, rehearing denied 339 U.S. 990, 70 S. Ct. 1017, 94 L. Ed. 1391).

speech an ordinance requiring a person to secure a license before using a city park to hold a meeting and giving an official unbridled descretion in granting or denying such license, would not put the officer on notice that an ordinance requiring persons to obtain and carry an identification card before soliciting persons to become members of a labor organization, and placing no discretion in any official as to issuing such card, also violates the due process clause of the Fourteenth Amendment.

The Fourteenth Amendment does not create an absolute guarantee of freedom of speech, press or religion, or the right to assemble and petition. Rather it guarantees that no person shall be deprived of those rights except under circumstances which the court has recognized to be constitutionally justified. Thus, in the *Screws* case (*supra*) the right considered under 18 U.S.C.A. 52 was not the right to life but "the right not to be deprived of life without due process of law; the right to be tried upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws." The facts in that case permit no doubt that the conduct there involved "flies in the teeth of decisions of the court."

B. Limited Cause of Action As Applied to This Case.

To subpoena a witness to appear before a legislative committee under the circumstances alleged here, particularly when the state law affords him the right to justify his refusal to testify through a judicial proceeding[11] does not constitute a deprivation of life, liberty or property without due process of law, according to any established test. This court has

[11] An opportunity which was successfully utilized by the plaintiff in this case (Paragraph 12 of Complaint, Record at p. 9.)

never held that such conduct by a public official was a denial of due process of law.

Opportunities to lay down such a rule have not been lacking. In cases involving contempt of Congressional committees the U. S. Courts of Appeal have consistently refused to condemn the actions of such committees in the face of allegations that: the purposes of the investigation were to censor thoughts and ideas and to deprive nonconformists of their employment, that the treatment afforded the witnesses did not conform to principles of due process; and that the hearings were intended to and did deprive the witnesses of due process by creating an atmosphere of fear and danger which, in itself, constituted a censorship of ideas and restraint upon free speech and a violation of the First Amendment. This Court has consistently refused to hear cases raising such issues. (*Dennis* v. *United States*, 171 F. 2d 986, cert. granted but limited to sole question of selection of jury, 337 U.S. 954, 69 S. Ct. 1527, 93 L. Ed. 1527; *Barsky* v. *United States*, 167 F. 2d 241, cert. den. 334 U.S. 843, 92 L. Ed. 1767; *Lawson* v. *United States*, 176 F. 2d 49, cert. den. 339 U.S. 934, 70 S. Ct. 663, 94 Law Ed. 1352, reh. den. 339 U.S. 972, 70 S. Ct. 994, 94 L. Ed. 1379; *Marshall* v. *United States*, 176 F. 2d 473, cert. den. 339 U.S. 933, 70 S. Ct. 663, 94 Law. Ed. 1352, reh. den. 339 U.S. 959, 70 S. Ct. 976, 94 L. Ed. 1369; *Josephson* v. *United States*, 165 F. 2d 82, cert. den. 333 U.S. 838, 68 S. Ct. 609, 92 L. Ed. 1122; *Townsend* v. *United States*, 95 F. 2d 352. cert. den. 303 U.S. 664, 58 S. Ct. 830, 82 L. Ed. 1121). [12]

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[12] Briefs, including briefs of amicus curiae, on file in this Court demonstrate that these questions have been raised. (See, for example, the briefs on file in *Lawson* v. *United States*, *supra*, No. 248, Oct. Term, 1949, which assert that the conduct of the Congressional committee there involved violated the First, Fourth and Fifth Amendments to the United States Constitution, and describe that conduct in some detail.)

Until such time as this Court gives weight to such objections by declaring that conduct of Congressional committees similar to that present in the *Lawson* case, *supra*,[13] violate either procedural or substantive due process of law, it cannot be said that similar conduct of State Legislative Committees violates "a federal right made definite by decision or other rule of law" or that such conduct "flies in the teeth of decisions of the Court."

If Section 43 is constitutional it is subject to the same restrictive interpretation which was placed on its criminal counterpart in the *Screws* case. As has been indicated, there is no standard of conduct for state legislators which can be derived from this Court's prior decisions interpreting the due process clause of the Fourteenth Amendment which provided a warning to the legislative committee involved in this case that its conduct might impose a civil liability in damages on its members. In the absence of such a warning that their conduct created a possible liability in damages, it is clear that a kind of "liability without fault" would be involved.[14]

Construed in accordance with the principles set forth in this brief, and in accordance with the doctrines announced in the *Screws* case, it is clear that no cause of action has been stated or can be stated in this case under

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[13] Descriptions of and comment upon the conduct of that Committee and other committees are contained in the petition for certiorari in the *Lawson* case No. 248, Oct. Term 1949; in the briefs of amicus curiae filed in connection therewith; in the New York Times November 26, 1947, 1:2; in 83 Cong. Rec. 7567-86, 86 Cong. Rec. 572-605; Dimock, Congressional Investigating Committees, 162.

[14] The creation of liability without fault is such an extraordinary step that the Court ought to avoid any such interpretation in the absence of a clear indication of legislative intent to do so. The potential liability under discussion is unique, also, in view of the attitude taken historically in connection with the liability in damages of public officials. That too is such an unusual kind of liability that a clear-cut expression of legislative intent to impose it in particular situations ought to be required. (On tort liability for public officers, see (1946) 46 Columbia Law Review 614, and materials cited therein.)

Section 43. The *Screws* case has only been applied to violent, aggravated and horrifying invasions of the fundamental duties which one human being owes to another. An examination of the cases involving criminal prosecutions against state officers under the Federal Civil Rights Acts will, we believe, demonstrate that its application has been so limited. It has been confined: (1) to cases where the conduct violates specific provisions of law (pre-*Screws* case); or (2) to cases where a fundamental right has been irrevocably destroyed by means so brutal and aggravated as to leave no room for doubt that basic and established concepts of due process, confirmed by years of tradition, have been violated. No such situation is presented under the allegations in this case.

In their carefully written dissent in the *Screws* case, Justices Roberts, Frankfurter and Jackson expressed concern that, even as limited by the majority, "this shapeless and all embracing statute can serve as a dangerous instrument of political discrimination in the hands of those so inclined."[15] Can the rough and tumble tactics which have traditionally been a part of the American political scene be equated with the flagitious conduct present in the *Screws* case? It is inconceivable that Congress, in enacting this statute, intended so to do. Is it not far more likely that this kind of problem was assumed to fall within the area of "political questions" as to which the courts have always maintained a "hands off" policy. (See, *Ohio ex.*

[15] This concern applies with even greater force, of course, to the civil cause of action here involved. The criminal statute can be applied against state officers only where responsible federal officials determine that there is a need therefore; and the majority of the Court in the *Screws* case was well aware of that practical limitation. (See *Screws* case, *supra*, 325 U.S. p. 132, 159). Where is the equivalent limitation with the civil cause of action, where the public officials of the states can be forced to defend themselves against private suits brought by any individual, responsible or irresponsible?

rel Davis v. Hildebrandt (1916), 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172.) On this point it is worth noting that the plaintiff has on several occasions classified this action as one involving political controversy. "The question . . . is whether or not they acted for the purpose of silencing a political opponent . . . " (Plaintiff's Brief in Opposition to the Petition for Certiorari, at p. 16.) "The present action is based on intentional abuse of State authority to deny a political opponent . . ." certain claimed rights. (Plaintiff's Opening Brief before the Circuit Court of Appeals, p. 8.)

For all the reasons set forth, we believe that plaintiff has not, and cannot, set forth a cause of action under Section 43 of Title 8, U.S.C., as properly construed. This Court is faced with the necessity for providing that construction, and we believe that it can only reach one conclusion in doing so, a conclusion which we have endeavored to outline in this brief.

C. Consequences of Failure to Limit the Cause of Action.

We do not intend to enumerate the many examples which might be listed to demonstrate the serious effect upon State government of the principles inherent in the *Picking* case and extended in the instant case. We desire merely to indicate the general ramifications of the problem, in the confident belief that the court will recognize that many examples could be given to illustrate it.

If, in addition to requiring State officials to avoid conduct which might be construed as a deprivation of a right embraced in the "vast uncharted sea" of the due process clause of the 14th Amendment, the statute also requires state officials to avoid conduct which may be construed as

reprisal for the exercise of such right, or conduct which may frighten a person, be he ever so timid, into failing to assert such right, [16] it is neither an overstatement nor the expression of a groundless fear to say that State Governments could not properly function.

Lawmaking is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid "cautious advance, step by step, and the distrust of generalities." (*Hughes* v. *Superior Court* (1949), 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985.) Could any State afford to take the next cautious step if, in so doing, it might expose the legislators who passed the statute, the state judicial officers who applied it to particular persons, and the state executive officers who enforced it to damage suits brought by every person who believes he is "punished" by the enforcement of the statute or who fails to assert his rights because of fear that the statute might be applied to him if he did so?

Dated: Raleigh, North Carolina,
February 10, 1950.

HON. HARRY MCMULLAN
Attorney General, State of North Carolina
Raleigh, North Carolina

And each Attorney General Heretofore Listed,

Amici Curiae

[16] It is apparent from a reading of the 13th paragraph of the complaint (R. p. 10) that his theory is based upon the premise that he was prevented from exercising his rights by *intimidation*. In plain English, fright induced by the Committee's actions "prevented" him from continuing to assert the rights. It is interesting to note that the complaint is devoid of any allegation that the Committee had threatened to, or intended to, repeat its actions if he continued to circulate his petition or urge that the appropriation be withheld.